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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

RICHARD A. GIDDENS,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the Supreme Court redefine the prohibition against sex discrimination contained in Title VII of the Civil Rights Act of 1964 to include any mistreatment of any employee, male or female, which involves any sexual connotation?

PARTIES TO THE PROCEEDING

1. Richard A. Giddens (hereinafter referred to as "Giddens"), Plaintiff in the District Court and Petitioner

2. Shell Oil Company[1] (hereinafter referred to as "Shell"), Defendant in the District Court and Respondent (hereinafter referred to as "Shell")

3. Jack Tucci (hereinafter referred to as "Tucci"), Defendant in the District Court . Note: Although Giddens has listed Tucci as a Respondent, Giddens did not appeal the dismissal of his action against Tucci by the District Court.

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[1] Shell Oil Company is wholly owned by Shell Petroleum Inc. Shell Petroleum Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by The "Shell" Transport and Trading Company, p.l.c., which are publicly traded companies. Shell Oil Company has no subsidiaries which are less than wholly owned.

TABLE OF CONTENTS

Questions Presented for Review i

Should the Supreme Court redefine the prohibition against sex discrimination contained in Title VII of the Civil Rights Act of 1964 to include any mistreatment of any employee, male or female, which involves any sexual connotation? i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Citation of Opinions 2

Jurisdictional Statement 2

Applicable Statute 3

Statement of the Case 3

Summary of the Argument 8

Argument 9

Conclusion 18

TABLE OF AUTHORITIES

CASES

Connecticut v. Teal, 457 U.S. 440, 448,
102 S.Ct. 2525, 2531, 73 L.Ed.2d 130 (1982) 15

Goluszek v. H. P. Smith, 697 F. Supp. 1452
(N.D. Ill. 1988) 13-16

Harris v. Forklift Systems, Inc., _____ U.S. _____,
114 S. Ct. 367 (1993) 11, 12

Henson v. Dundee, 682 F.2d 897,
902 (11th Cir. 1982) 11

Meritor Savings Bank, FSB v. Vinson,
477 U.S. 57 (1986) 10, 11

Price Waterhouse v. Hopkins, 490 U.S.
228 (1989) 9, 12

Rabidue v. Osceola Refining Co., 805 F.2d 611,
623 (6th Cir. 1986) 16

Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213
(7th Cir. 1986) 15

REGULATORY DECISIONS

E.E.O.C. Dec. No. 74-05, 6 Fair Empl. Prac. Cas.
(BNA) 834 (1973) 14

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 3

42 U.S.C. § 2000e, Title VII of the Civil Rights Act of 1964 . . . . . .passim

ARTICLES

Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 Harv.L.Rev. 1449, 1451-52 (1984) 15

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This case purports to involve a claim of sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Giddens is a former employee at Shell's Odessa Refinery. His claim is based on rough treatment, including language and actions with sexual connotations, by other male employees.

The case was filed in the United States District Court for the Western District of Texas on July 16, 1991. The case was tried to a jury on August 4 and 5, 1992. The jury returned a verdict in favor of Shell on all theories, including violation of Title VII. On September 2, 1992 a Final Judgment was signed dismissing all of Gidden's claims.

Giddens appealed to the United States Court of Appeals for the Fifth Circuit complaining, inter alia, of the form of

the questions submitted to the jury in connection with the alleged violation of Title VII. On December 6, 1993 the Fifth Circuit issued a per curiam decision affirming the judgment in favor of Shell. The Fifth Circuit held that Giddens failed to state a claim for relief under Title VII.

In the Petition for Writ of Certiorari Giddens complains that the Fifth Circuit erred in holding that Giddens must prove that he was treated differently because he is male in order to state a claim for relief under Title VII. Giddens requests that the Supreme Court redefine the prohibition against sex discrimination contained in Title VII to include any mistreatment of any employee, male or female, which involves sexual connotations.

CITATION OF OPINIONS

The Final Judgment of the United States District Court for the Western District of Texas dated September 2, 1992 was not published. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

The per curiam decision of the United States Court of Appeals for the Fifth Circuit dated December 6, 1993 was not published. A copy is reprinted in the Appendix to the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to consider the Petition for Writ of Certiorari under 28 U.S.C. § 1254(1).

APPLICABLE STATUTE

This case involves the correct construction of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. This statute is reprinted in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

(i)Course of Proceedings and Disposition in Courts Below

Giddens filed suit against Shell and Jack Tucci, a former Shell foreman, in the United States District Court for the Western District of Texas on July 16, 1991. The District Court had jurisdiction under 28 U.S.C. § 1331. The First Amended Complaint alleged eight causes of action, including a claim of violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. (R.vol.1 p.17).

The case was tried to a jury on August 4 and 5, 1992. The case was submitted to the jury on special questions. (R.vol.2 p.275). Based on the answers to these questions, a Final Judgment dismissing all of Gidden's claims was signed on September 2, 1992. (R.vol.2 p.293).

Giddens appealed to the United States Court of Appeals for the Fifth Circuit complaining, inter alia, of the form of the questions submitted to the jury in connection with the alleged violation of Title VII. Shell cross-appealed complaining that Giddens had failed to state a cause of action for violation of Title VII. On December 6, 1993 the Fifth Circuit issued a per curiam decision affirming the judgment in favor of Shell. Giddens had neither alleged nor proved that his employer had treated him differently because he is male.

(ii) Statement of Facts

The following statement of facts is substantially different from that submitted by Giddens. Most of the testimony in this case was highly contested with dramatically different versions of the same events. This statement of facts is based on the evidence which supports the jury's verdict in favor of Shell.

Richard Giddens was employed as an operator at Shell's Odessa Refinery in 1985. (R.vol.3 p.12). He worked on shift and reported to a supervisor. (R.vol.3 p.13).

Giddens was not a popular employee. (R.vol.4 p.155-157). He had problems getting along with other operators. (R.vol.3 p.54). Giddens was intelligent but lacked aggressiveness and desire. Consequently, he fell behind in his training. (R.vol.3 p.168).

In 1988 Jack Tucci became the supervisor of the shift on which Giddens worked. (R.vol.3 p.14). Tucci was a good supervisor who was technically competent and safety conscious. However, Tucci was gruff in his communications and could be demanding. (R.vol.3 p.103-104, 137-138, vol.4 p.142, 146, and 149). Typical of the comments about Tucci is the following testimony.

"Q. What kind of shift supervisor was Tucci?

A. (by Gary Moore, operator and Relief Supervisor) I always thought Jack was one of the better shift supervisors out there. He was always real strong on safety, treated all the people the same. He was kind of gruff, you know, rough talking. A lot of people take that different ways. Some people are more

sensitive to it than others, but he was the same way with everybody."

(R.vol.4 p.142-143)

Predictably, Giddens had a personality conflict with Tucci. (R.vol.3 p.169). Giddens complained that Tucci followed his work too closely and expected too much of him. (R.vol.3 p.166). Giddens had problems accepting criticism from Tucci. (R.vol.4 p.28). Nevertheless, even Giddens admitted that Tucci treated everyone equally. (R.vol.3 p.55). Tucci wrote good evaluations about Giddens's performance. (R.vol.3 p.79).

Tucci was transferred to another shift in 1990 and no longer supervised Giddens on a regular basis. Tucci would be Giddens supervisor only when Giddens split his days off. Even then Giddens would use a day of vacation to avoid working with Tucci. Giddens was teased about this behavior by both Tucci and co-employees. (R.vol.3 p.68-69).

Regrettably, Tucci enjoyed playing practical jokes and had a crude sense of humor. (R.vol.4 p.29-31). Despite a prohibition on "horseplay" in the refinery, Tucci would engage in such activity. Another operator on the shift, Craig Harner, also enjoyed rough humor. Harner enjoyed putting sardines in gloves and "goosing" people. (R.vol.4 p.143).

Giddens himself engaged in practical jokes, including jokes with sexual connotations. (R.vol.3 p.54, vol.4 p. 154). Giddens performed a "french" rope trick which consisted of tying a rope so to resemble a penis. (R.vol.3 p.71-72, vol.4 p.20-21). Giddens also wore T-shirts inscribed "Check My Nuts." (R.vol.4 p.144, 151, and 154-155). Giddens suggested that a female operator had been hired only to do the dishes. (R.vol.4 p.154).

Despite their antagonistic relationship, Giddens made no complaints about his treatment by Tucci, except regarding work issues, until February 1991. Prior to February 1991 Giddens made no complaints that Tucci or Harner were harassing him in any way. (R.vol.3 p.117, 138-141, and 163-168).

On Sunday, February 3, 1991 Tucci and Harner played a practical joke on Giddens. Giddens was sitting at a desk in the control room when Tucci and Harner approached him from either side. Each grabbed an arm and leg and lifted Giddens from the chair and then set him back down. Unknown to Tucci, when Giddens was in the air, Harner released one leg and "diddled" Giddens's butt. At the time everyone in the control room laughed, including Giddens. It was considered "horseplay." (R.vol.3 p.100-102, vol.4 p.34, and 133-134).

The next day Giddens reported the incident to Carl Crawford, the Shift Supervisor and Tucci's boss. Crawford and Giddens then met with Gary Miller, the Process Manager. (R.vol.3 p.29). Miller investigated the incident by first talking to Tucci and Harner. Both admitted their involvement in the incident. Tucci admitted that the incident was "horseplay" and that "horseplay" was prohibited, especially by supervisors. Both Tucci and Harner were suspended pending completion of the investigation. Tucci offered to retire. (R.vol.4 p.120-123).

Miller also talked to two operators who were in the control room on Sunday, Bruce King and Darryl Rives. Upon completion of the investigation, Miller, Steve Cooke, the Employee Relations Manager, and the Refinery Manager decided to fire Harner and accept Tucci's offer to retire. (R.vol.4 p.124-126). Harner had previously been disciplined for "horseplay." Shell viewed the incident as fairly severe

since a supervisor had been involved in a prohibited activity. Therefore Shell decided to terminate both employees. (R.vol.3 p.134-135).

On May 20, 1991 Giddens and Crawford met with Steve Cooke. Crawford was uncomfortable with Giddens's physical and mental condition and felt it was not safe for Giddens to work in the refinery. For the first time Giddens related other incidents of "horseplay" by Tucci, including Tucci rubbing up against him in a bathroom. Giddens was placed on disability leave. (R.vol.3 p.120-122). Giddens has not worked since May 1991. (R.vol.3 p.45-46).

SUMMARY OF THE ARGUMENT

The prohibition against sex discrimination contained in Title VII refers to disparate treatment on the basis of gender, not mistreatment involving sexual connotations. Sex harassment in the form of a hostile work environment is actionable under Title VII only as a form of gender discrimination.

Giddens wants to abandon any link between a hostile work environment and gender discrimination and simply declare that any work environment polluted by references to sexual activity is a violation of Title VII. This simplistic analysis would require the court to rewrite Title VII.

ARGUMENT

1. Should the Supreme Court redefine the prohibition against sex discrimination contained in Title VII of the Civil Rights Act of 1964 to include any mistreatment of any employee, male or female, which involves any sexual connotation?

The basis for subject matter jurisdiction in this case was an alleged violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Giddens alleged that he was "sexually harassed" by a supervisor and co-employee when he was subjected to jokes and horseplay with sexual connotations.

On appeal Shell argued, and the Fifth Circuit agreed, that Giddens had not stated a cause of action for violation of Title VII. Giddens neither alleged nor proved that he was singled out because he is male.

In his petition for Writ of Certiorari Giddens argues that he should not have to prove that he was singled out because he is male in order to state a violation of Title VII. Giddens argues that any harassment is a violation of Title VII if it makes any reference to a sexual activity.

(a) "Sex" means gender.

There is a superficial appeal to Gidden's argument. Title VII does prohibit discrimination against any individual because of his "sex." However, "sex" means gender. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

> "Congress' intent to forbid employers to take *gender* into account in making employment decision appears on the face of the statute."

Id. at 239 (emphasis added)

(b) Not all "harassment" is a violation of Title VII.

Obviously not all "harassment" is a violation of the Civil Rights Act. Title VII is not a workplace beautification act. It does not punish any ill treatment of any employee. It merely prohibits disparate treatment based on the sex (gender), race, religion or national origin of an employee. Title VII does not regulate any other quality or characteristic of an employee which may lead to different treatment. *Id.* at 239. There are any number of characteristics not covered by Title VII which may lead to different treatment. An employee may be treated better (or worse) by a supervisor because of the school he attended, the state in which he was born, his personality, etc. An employee mistreated because of any such characteristic would not be able to state a cause of action for violation of Title VII. Title VII is not a general fairness statute.

Of course, references to sexual activity can be a basis for gender discrimination but only if the references create unequal working conditions for one gender. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), recognized that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex (gender) has created a hostile or abusive work environment. *Id.* at 66. The gravamen of the action, however, is that employees of one gender are treated differently from employees of the other gender; i.e., women are subjected to sexual abuse while men are not.

> "Respondent argues, and the Court of Appeals held, the unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate *because of the subordinate's*

> *sex*, that supervisor "discriminate[s]" on the basis of sex."
> *Id.* at 64. (emphasis added).
>
> "As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee*, 682 F.2d 897, 902 (1982):
> Sexual harassment which creates a hostile or offensive environment for *members of one sex* is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."
>
> *Id.* at 66-67 (emphasis added).

Certainly, a male can sue for discrimination in violation of Title VII, even discrimination based on a hostile work environment. However, to do so he must show that he was singled out because of his gender.

(c) Giddens offered no evidence that he was singled out because of his gender.

The Fifth Circuit held that Giddens did not state a cause of action for violation of Title VII because he produced no evidence at trial tending to prove that he had been treated differently because he is male. Giddens does not dispute that he offered no such evidence. However, he argues that he was not required to offer such evidence under *Meritor Savings Bank, FSB v. Vinson, supra*, and *Harris v. Forklift Systems, Inc.*, _____ U.S. _____, 114 S. Ct. 367 (1993).

Meritor Savings Bank held only that a plaintiff did not have to prove a tangible loss of an economic character in order to state a cause of action for sex (gender) discrimination based on a hostile work environment. *Meritor Savings Bank* did not hold that a plaintiff did not have to prove that the mistreatment was directed at the plaintiff because of the plaintiff's gender. *Meritor Savings Bank* did not create a new species of prohibited conduct known as "sexual harassment." *Meritor Savings Bank* merely held that creation of a hostile environment based on sexual activity was a form of gender discrimination.

Similarly, *Harris* merely clarified that sex (gender) discrimination based on a hostile work environment did not have to seriously affect the employee's psychological well-being in order to be actionable. Title VII is violated when the workplace is permeated with the conduct that a reasonable person would find hostile or abusive. *Harris* did not hold that a plaintiff did not have to prove that the conduct was directed at the plaintiff because of the plaintiff's gender.

(d) Giddens offered no evidence of "sex stereotyping."

Finally, Giddens attempts to compare his case to that of the plaintiff in *Price Waterhouse v. Hopkins, supra.* In that case a female employee who was refused admission as partner in an accounting firm offered expert testimony that criticisms of the employee's performance were based on sex stereotyping. The employee was described as needing "a course at charm school" and it was suggested that her interpersonal skills could be corrected by a soft-hued suit or a new shade of lipstick. *Id.* at 256.

Because these comments indicated a stereotyped view of women, they were evidence that the firm was evaluating the employee not on her performance but on her gender.

It is interesting that Giddens cites *Price Waterhouse*. This case clearly holds that Title VII prohibits *gender* discrimination and discusses sex stereotyping as merely some evidence of gender discrimination. There is no suggestion that all offensive sexual remarks are actionable under Title VII.

Giddens offered no evidence of comments made about him that indicated sex stereotyping. Giddens asserts that he did not exhibit the personal characteristics that his superior thought a stereotypical male should possess. Petitioner's Brief at p.3. However, Giddens cites no evidence in the record to support this position. No such evidence was introduced.

(e) Giddens wants to turn Title VII upside down.

Courts have recognized that gender discrimination can take the form of a hostile work environment based on sexual activity. A cause of action alleging gender discrimination in the form of a hostile work environment was analyzed in *Goluszek v. H. P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988), a case which involved facts similar to those presented in this case.

Goluszek had never been married and never lived any where but his mother's home when he went to work for H.P. Smith as a mechanic. His co-workers teased him unmercifully about his lack of sexual experience. The co-workers told Goluszek that they would fix him up with a promiscuous woman, showed him pornographic pictures, accused him of being gay, and made other sex related

comments. The co-workers also threatened to knock him off his ladder and "poked him in the buttocks with a stick." Goluszek reported these actions to his supervisor and the general foreman but they did nothing. In fact, both used profane language in talking to Goluszek. The foreman dismissed Goluszek's claims of harassment as mere "shop talk."

After he was fired, Goluszek filed suit in federal court for violation of the Civil Rights Act.

> "In Count I Goluszek claims that H.P. Smith sexually discriminated against him by refusing and failing to remedy and control the continuous use of sexual harassment directed toward him by fellow employees." 697 F.Supp. at 1455.

In response to a Motion for Summary Judgment by H.P. Smith, District Judge Ann C. Williams carefully analyzed the purpose and intent of the Civil Rights Act. She recognized that discrimination can take the form of sexual harassment either (1) by a quid pro quo demand for sexual favors in exchange for job benefits or (2) by the creation of a hostile work environment. Judge Williams noted that even in a hostile work environment the employee must demonstrate that but for the employee's gender, the employee would not have been the object of harassment.

Applying these principals to Goluszek's allegations, Judge Williams found that the conduct of Goluszek's co-workers and supervisors did not state a claim for violation of the Civil Rights Act.

> "Simply stated, the defendant's conduct was not the type of conduct Congress intended to

sanction when it enacted Title VII. The goal of Title VII is equal employment opportunity. *Connecticut v. Teal*, 457 U.S. 440, 448, 102 S.Ct. 2525, 2531, 73 L.Ed.2d 130 (1982). That goal is accomplished in part by imposing an affirmative duty on employers to maintain a working environment free of discriminatory intimidation. See E.E.O.C. Dec. No. 74-05, 6 Fair Empl. Prac. Cas. (BNA) 834 (1973). The discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv.L.Rev. 1449, 1451-52 (1984). Title VII does not make all forms of harassment actionable, nor does it even make all forms of verbal harassment with sexual overtones actionable. The "sexual harassment" that is actionable under Title VII "is the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person." Id. at 1451. Actionable sexual-harassment fosters a sense of degradation in the victim by attacking their sexuality. Id. at 1445. In effect, the offender is saying by words or actions that the victim is inferior because of the victim's sex. *Cf. Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986) ("Such severe harassment becomes discriminatory because it deprives the victim (usually female) of the right to

> participate in the work place on equal footing with others similarly situated").
>
> During the times relevant to his claim, Goluszek was a male in a male-dominated environment. In fact, with the exception of the reference to a female employee in the letter, each and every one of the figures in this story was a male. The argument that Goluszek worked in an environment that treated males as inferior consequently is not supported by the record. In fact, Goluszek may have been harassed "because" he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace. *Compare Rabidue [v. Osceola Refining Co.]*, 805 F.2d 611, 623 (6th Cir. 1986) (Keith, J., dissenting) ("The overall circumstances of plaintiff's workplace evince an anti-female environment"). A wooden application of the verbal formulations created by the courts would salvage Goluszek's sexual harassment claim. The court, however, chooses instead to adopt a reading of Title VII consistent with the underlying concerns of Congress and grants H.P. Smith summary judgment on that claim." 697 F.Supp. at 1456.

The same common sense analysis should be applied to the allegations in this case. Like Goluszek, Giddens is a male in a male-dominated environment. Each and every one of the figures in his story is a male. The argument that Giddens worked in an environment that treated males as inferior is not supported by the record. Giddens may have

been "harassed", but that harassment was not of a kind which created an anti-male environment in the workplace.

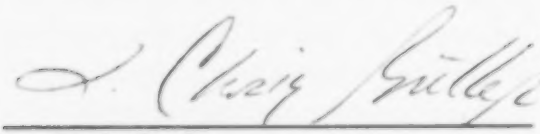
The actions of Tucci and Harner were crude, juvenile and boorish. Their actions were spiked with sexual innuendos. Their actions were certainly reprehensible and were not condoned by Shell. (Harner was fired following the February 3, 1991 goosing. Tucci resigned in lieu of discipline.) However, their actions did not discriminate against men by creating an anti-male environment through sexual harassment. The Civil Rights Act was not intended to police all interpersonal relations within the workplace. Incidents of horseplay do not become violations of the Civil Rights Act just because there is some sophomoric reference to a sexual act.

Giddens wants to stand Title VII on its head. He wants to abandon any analysis based on gender discrimination and simply declare that any mistreatment of any employee, male or female, involving any sexual connotation is a violation of Title VII. To do this would require the Supreme Court to rewrite Title VII and declare that the prohibition against sex discrimination means mistreatment involving sexual references and not gender discrimination. It would be inappropriate for the Supreme Court to take such action.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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